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SGIA Research Working Papers Series

The Borders of a Just War

Dr John Williams
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The Borders of a Just War

Introduction

This paper aims to contribute to the contemporary debate about Just War in a, hopefully, distinctive fashion. It seeks to map out (pun intended) a claim about the problematic nature of the way in which Just War theory has responded to the two main challenges surrounding the ethics of violence in international relations since the end of the Cold War – namely the debates about humanitarian intervention and the ‘war on terror’. The claim, and the pun, revolve around the understanding of the role and nature of territory in international politics, and specifically Just War theorists’ debates about these two challenges. In particular, the paper looks at a privileging of the territorial, bordered state in contemporary Just War debate in order to suggest how it is that non-state based political forms, projects and activities are marginalised in analysis and also ethically disadvantaged. Whilst we may well go along with the ethical condemnation of fundamentalist ‘jihadist’ versions, or perversions, of Islam, that *kind* of project – non-territorial, at least in the conventional sense, and separate from state-based conceptions of citizenship as the ethically ideal political relationship between individual and political authority, cannot gain a foothold within Just War’s response to changing patterns of violence.

The paper proceeds in four principal stages. The first outlines the ‘triumph’ of Just War theory in shaping ethico-political responses to humanitarian intervention and the war on terror. This has generated some insightful and highly sophisticated thinking, developing the ancient tradition of Just War in appealing and intriguing ways.

Critics, and there are more than the few this paper samples, have responded with some effective arguments of their own, but, in general, the paper argues in its second section, they have also missed out on the significance of scale and space for this issue. This is not to deny that they score some important points against Just War theory and the particular ways it is used in the contemporary debates about intervention and anti-terrorism. Here, the paper starts to outline the ideas of territory, scale and space that are important to its critique of Just War. It also shows how debates about scale are influencing other approaches to the changing patterns of violence in international relations.

The relationship between space, scale and ethics is the principal subject of the paper’s third section, bringing in work in political geography and critical geopolitics in order to demonstrate the extent of the critique of ‘Westphalian’ territorial thinking that, I argue, is inherent and unquestioned in Just War debates.

Finally, the paper turns to the ways in which this unreflective approach to the ethics of territory works to privilege the state in contemporary developments of Just War and why this is a price that should not be paid unthinkingly. A more open-minded, or at least considered, approach to ethics and territory within Just War holds out the possibility of a response to these challenges that is more intellectually fleet of foot and also better positioned to respond positively to alternative ethico-political conceptions of the role of territory in international relations, conceptions that are often highlighted as of growing relevance and significance in other areas of the discipline and practice of international politics.

Just War, humanitarian intervention and the war on terror – a tale of triumph?

Just War theory has an enviable record of success in shaping, if not dominating, political-ethical debates about the use of force in international relations. As some have noted, this success brings with it certain dangers (Walzer 2002), but sharing Walzer's general satisfaction with the way in which Just War ideas and categories have become unavoidable in thinking about and assessing the use of violence is not difficult. Moral scepticism of the sort portrayed by Frost (1996) or Dower (1998) may have saloon-bar appeal but Just War's ubiquity and utility, we will come to its intellectual sophistication shortly, seem to have corralled it within the realm of those whose cynicism stems from intellectual inadequacy. For those committed to the centrality of ethics to both the study and practice of international relations the 'triumph' of Just War is heartening.

Two particular instances serve to highlight how it is that Just War has been able to shape and direct debate, even as the character of violence in international relations has moved away from classic inter-state war driven by traditional geo-strategic logics of the control of territory and the maximisation of power in pursuit of security from attacks by other states. Throughout the 1990s the debate over humanitarian intervention, still alive and well today (e.g. Bellamy, 2006), has referred back time and again to the idea of Just War. Whether in the form of landmark policy statements (Blair, 1999; ICISS, 2001) or in the majority of the leading academic analyses and, in particular, advocacy, of a limited right to humanitarian intervention (e.g. Téson, 2005c; Wheeler, 2000) an amended and adjusted Just War framework has been central. Augmenting the idea of self-defence as just cause to include a right, or possibly even a duty, to defend the victims of grave humanitarian crises; debating the nature of legitimate authority in these circumstances in order to minimise the opportunity for abuse by the powerful; wrestling with the challenge of intent in multi-faceted situations where complex actors may intend multiple outcomes and be motivated by a variety of desires; and looking at how Just War's rules of combat may have to be changed to deal with the absence of a 'battlefield', in the conventional sense, have all been important elements of this process.

The second challenge that, on the triumphalist account, Just War has risen to has been, of course, what we can call for the sake of economy, the 'war on terror,' in the period post September 11th 2001. Despite the political rhetoric about the absence of rules (Hurrell, 2002), or the paradigm shattering nature of trans-national, mass casualty terrorism summed up in the idea that world changed for ever on 9/11, Just War ideas and categories have remained central to public political debate. Again, the reaction has been to augment, refine, adjust and revisit the ideas of just cause, legitimate authority, right intention, proportionality, non-combatant immunity and so on. Ideas such as preventative war (NSC, 2002; Buchanan and Keohane, 2004; Elshtain, 2004; Kaufman, 2005) and the notion of 'illegal combatants' as a new, ethically laden, category into which trans-national terrorists fall (e.g. Aldrich, 2002), have sparked vibrant political and academic debates. Some of these revisit old territory, cast with a fresh light from the burning towers of the World Trade Centre, such as the permissibility of torturing suspects who may have information about planned attacks (e.g. Dershowitz, 2002; Krauthammer, 2005). Others are substantively new, such as Téson's (2005a) efforts to connect humanitarian intervention to regime change and the rights of liberal states, especially the US, to replace illiberal tyranny in the name of both the victims of such tyrants and the wider call of security for the ethically superior liberal parts of the world.

Indeed, Téson's argument (2005a) symbolises the triumph of Just War theory in his appeal to bring together the two post-Cold War challenges to Just War theory's usual terrain of inter-

state war into one revised doctrine. This, of course, is not without problems or critics (e.g. Nardin, 2005), but it is indicative that Just War theory and Just War theorists have seen in this ancient tradition of thought the basis for an effective ethical framework for addressing pressing contemporary issues of violence in international relations. Téson's line of argument is not dissimilar to that of Feinstein and Slaughter (2004) who similarly argue for the connection between those advocating limited rights of humanitarian intervention and the need to combat trans-national terrorism and the proliferation of WMD. Whilst they lack the ethical focus and moral certainty of Téson, Feinstein and Slaughter (2004: 148-9) still deploy recognisable notions of just cause, proportionality, legitimate authority, right intention and last resort borrowed from Just War's lexicon.

Additionally, Buchanan and Keohane (2004: 1, 4) also assume an unproblematic conflation of, firstly, cosmopolitan ethical concern with human rights and, secondly, a straightforward statement that cosmopolitanism of this stripe is 'central to the just war tradition and the current international legal order's allowing human rights to limit state sovereignty.' That would certainly come as news to the historians of the Just War tradition or to those, such as pluralist members of the English school (e.g. Bull, 1977; Jackson, 2000; Mayall, 2000) who typically see rules on violence such as those of the Just War as being principally about protecting the rights of states. That Buchanan and Keohane (2004: 5-10) move on from here to construct a defence of preventive war in the face of non-imminent threats of mass-casualty terrorist attack further emphasises the highly distinctive way in which human rights, just war, humanitarian intervention and anti-terrorist actions have been blended in recent debate (Lee, 2005: 106-7).

The intellectual sophistication of this debate is often impressive, and intimidating. The weight of ages bears down heavily on those contributing and heavyweights of the philosophical, theological and political theoretical traditions are wheeled out at regular intervals by participants to grant vicarious authority to contemporary debate. Saints Augustine and Aquinas, Grotius, Kant, Machiavelli, Thucydides, Hobbes, Locke and other stalwarts of the Western canon are invoked. Some feel this weight more than others, perhaps, seeing the framework that Just War inherits from its venerability as providing a resource base for addressing contemporary issues that needs little augmentation. James Turner Johnson (1999) stands as perhaps the pre-eminent example of this approach, his 'Justice and Contemporary Warfare' drawing extensively on the tradition to encompass the contemporary challenges, principally of humanitarian intervention, but also applicable to the 'war on terror'.

Others develop the more 'applied' approach of the leading contemporary Just War theorist and advocate, Michael Walzer, whose 'Just and Unjust Wars' (2000) remains unavoidable in discussions of the topic and a source of insight and inspiration for almost anyone who works in the field. Walzer also wants to lay some claim to the theological and philosophical strands of the tradition, but it is its ability to throw light on historical 'illustrations' and the way in which Just War has learnt from, adapted to and engaged with historical trends in the material capabilities of violence that is its key virtue. Just War is a living tradition, and all the better for not being inextricably tied to foundational theological or philosophical claims about the nature of human beings, law or the divinely ordained order of things. Secularised, goes the argument, Just War is stronger, although we should not forget that, as Elshtain notes (2003: 69), we don't have to scratch too deep before we '... find a theological claim lurking underneath.'

This secularisation is partially the product of the insertion of Just War thinking into the 'Westphalian' world, as Elshtain terms it (2003: 69), and thus the logic of an international society or societies that arise as a result (e.g. Bull, 1977; Keene, 2002). But it is also connected to the role of Just War in shaping international law and the development of the international

legal tradition, particularly its positivist incarnations where rational interest underpins jurisprudential reasoning and the nature and purpose of public law. The Hague and Geneva Conventions and the creation of what Walzer (2000) calls ‘the legalist paradigm’ as the dominant contemporary incarnation of Just War thinking exemplify this trend, adding further to the intellectual credentials of Just War via the distinctive contribution of legal reasoning and the accretion of treaty and customary law. The idea of legitimacy as a politico-legal construct, associated most closely with Thomas Franck (1990), and the decline of strict legal positivism and therefore the re-connection of legal manifestations of Just War thinking with wider normative theoretical debate are a further instance of the complexity, sophistication, rigour and sheer volume of material available for contemporary Just War theorists to draw upon.

This final example of the sophistication of the debate that I wish to highlight is the development of a new category within Just War thinking, adding the idea of *jus post bellum* to the traditional *jus ad bellum* and *jus in bello*. Johnson (1999: 191-218) is amongst those developing this category, although he doesn’t use the label, reiterating the fact that even those who stick most closely to the classical resources of the tradition are able to innovate and respond to contemporary challenges. Evans (2005: 19-20), Rigby (2005) and Hayden (2005) develop an explicit discussion of the *jus post bellum*, and earlier discussions of humanitarian intervention, such as Wheeler (2000), implicitly require such a category because of their emphasis on the need for long-term commitment to prevent the recurrence of humanitarian disasters necessitating intervention to ‘save strangers’. In policy circles, the ICISS (2001) also deploy such a notion, via a ‘responsibility to rebuild’ as an inherent component of the ‘responsibility to protect’.

The wars in Afghanistan and Iraq have brought home the necessity of *jus post bellum* in the ‘war on terror’, too. They have also demonstrated the enormously difficult task that this can represent when establishing such justice is inextricably entangled with a concept that is deeply indebted to liberalism, yet local circumstances are not necessarily hospitable to that political doctrine. In some ways, this, too, is recapturing the richness of the Just War tradition. Restoration of the *status quo ante bellum* as being about all that needed to be said on this subject, and thus covered by the right intention principle of the *jus ad bellum*, stands in contrast to the idea of punishment that was prominent in the classic, Christian texts on Just War. It is notable, though, that some analysts, such as Gilbert (2003: 100-1) argue that the war on terror has much of the character of punitive punishment that the medieval tradition included. Certainly some contemporary *jus post bellum* ideas recapture some of that spirit, for example in seeing arraignment of those responsible for gross human rights abuses before appropriate, often international, courts as essential. I have no intention of getting involved in the restorative versus retributive justice debate (e.g. Gilbert, 2003: 103-51; Rigby, 2005; Schaap, 2005) in post-conflict societies, but, again, the sophistication of this discussion highlights the significance of the move to a serious consideration of the nature and content of *jus post bellum*.

More pertinent to this paper is the way in which *jus post bellum* has been linked to political transformation in post conflict societies towards the embedding of liberal democratic values, concepts, institutions and practices. This applies whether we are dealing with the aftermath of humanitarian intervention or action pursuant to the war on terror. In some of its strongest statements (e.g. Elstain, 2003; 2004; Téson, 2005a) *jus post bellum* is almost defined by the creation of the institutions of liberal democracy. Those who oppose or reject liberal ideas, values and principles are guilty of a criminal act and thus lose any standing within the idea of Just War. As criminals ‘... *their* opposition to intervention does not count’ (Téson, 2005a: 16)

– it is illegal to act with the intention of preventing the creation of a liberal state or from illiberal or anti-liberal motives, and criminals lose any defensive rights that Just War accords.

Téson's characterisation of this argument may verge on the caricature. Nardin (2005), in a critique of Téson, describes his view as 'humanitarian imperialism', a label Téson accepts (2005b: 30), arguing that this represents a revolution in the understanding of the nature of the Just War tradition, established understandings of humanitarian intervention and the character of the international system of sovereign states. Whilst I am generally sympathetic to most of Nardin's points, both he and Téson, and Elshtain (2003), share a statist approach that has been the source of criticism of the Just War tradition in the past, at present and, in a hopefully somewhat distinctive way, is a source of criticism for this paper as well. However, having sketched the ways Just War has responded to the challenges of humanitarian intervention and the 'war on terror', largely successfully in the eyes of those canvassed above, it is time to look at the nature of some of the critiques, especially those that connect to and contextualise the specific argument I wish to make in response to the triumph of Just War theory.

Challenging Just War theory

One of the oldest challenges to Just War stems from the idea, most commonly associated with Kant, that its advocates are the 'sorry comforters' of war. Just War theory has offered spurious ethical weight to a realm of human activity that, at best, can be seen as an occasionally necessary evil in the face of even worse evils, but not one that can ever claim any sort of ethical virtue.

Pacifism, whether religiously motivated – and, of course, overcoming Christian pacifism was one of the reasons behind the development of Just War thinking – or inspired by a secular philosophical commitment (e.g. Reader, 2000) continues to challenge Just War. However, pacifism's challenge is one which we have to either accept, and thus reject Just War, or reject, in which case Just War becomes the default position for those who nevertheless wish to recognise the ethical dimension to warfare and avoid some kind of moral scepticism. More interesting to this paper is the way in which the idea of human rights is being used to critique Just War theory, leading to a debate over whether or not human rights are compatible with, and even enhanced by, a commitment to maintaining classic Just War principles and practices. We have seen how some (Buchanan and Keohane, 2004; Téson, 2005) have seen little difficulty with this. Others have debated whether human rights serve as a useful analogy for Just War principles, for example is the state's right to self defence analogous to that of individuals, or is it instead the cumulative result of the individual rights of the state's citizens (e.g. Gilbert, 2003: 24-46; McMahan, 2004; Rodin, 2004; Ryan, 2004)?

Alternatively, Martin Shaw (2005) has used human rights as a central part of his critique of what he labels 'risk transfer war', which characterises, he argues, the ways in which the leading Western military powers, most importantly the US, have pursued military operations in the last decade. This stands as the latest incarnation of what he (2003) labels 'degenerate war' – the process by which, throughout the twentieth century, war became increasingly focused on the killing of civilians and the destruction of societies. That this process has been driven by the leading powers throughout this time, means that it is impossible to see this as being a consequence of 'degenerate' regimes, such as Nazi Germany. Neither is it limited to the increasingly significant phenomena of 'new wars' (Kaldor, 1999), in which the collapse of legitimate political authority helps bring about brutal internecine conflicts driven by ideological, religious or nationalist prejudice, economic enrichment or some combination of

the two. For Shaw, the wars fought in Kosovo, Afghanistan and Iraq are from the same stable as those in Democratic Republic of Congo, Chechnya or Liberia.

What characterises this commonality is the abuse of human rights. In the latter conflicts this is perhaps more obvious, because of the way in which pillage, rape, mutilation, massacre and torture are routinely deployed by those ostensibly part of armed organisations. In the case of Kosovo, Afghanistan and Iraq, however, the degeneracy is less immediately apparent. Although abuses such as those at Abu Ghraib, Camp Breadbasket, CIA 'black prisons' and Guantanamo Bay are widespread enough to call into question the 'bad apple' explanations routinely offered by the US and UK political and military establishments, Shaw's argument is somewhat different. His claim is that contemporary Western warfare abuses human rights because of the way that it transfers risk from Western combatants to the non-combatants of the state where the conflict is taking place, even when the state apparatus may not be the target of military action.

Thus, even though, precision guided munitions have enabled Western militaries to avoid some of the most blatant instances of degeneracy, such as the area bombing of cities with the express intent of killing civilians, the pattern of transferring risk to civilians has in fact accelerated. Within casualty figures that may be lower overall, the proportion of enemy non-combatants being killed or injured has risen, and risen dramatically. In the war over Kosovo, famously, NATO forces suffered no combat deaths. In the war to overthrow the Taliban, the only US combat death was of a CIA agent caught up in a riot of prisoners of war. The prison was subsequently levelled and the vast majority of the prisoners killed, despite their non-combatant status in Just War terms (Shaw, 2003: 126-7, 238-40; Gilbert, 2003: 101).

Shaw's critique is powerful and thought-provoking. His challenging of arguments commonly offered that precision guided munitions offer a welcome opportunity to restore a degree of discrimination between combatant and non-combatant (e.g. Elshtain, 2003: 69 n. 6) that the industrialised warfare of the twentieth century had seemingly destroyed turns on the balance of risk and the relationship to human rights. Shaw argues that the rights of Western combatants are now almost automatically placed ahead of those of enemy non-combatants. Saving soldiers lives at the cost of civilians is a part of the degeneracy of warfare, and even if the scale of civilian losses may be lower in terms of outright numbers they now make up a larger and larger proportion of those killed and injured, with Western combatants becoming less and less likely to be killed or injured (Shaw, 2003: 238-40; 2005).

Insurgency in Iraq and Afghanistan may have done something to restore the vulnerability of Western troops, but even here the number of civilians being killed dwarfs the number of troops. Shaw thus argues that, from the perspective of human rights, the Just War tradition has comprehensively failed to rein in the degenerate tendencies of warfare. Just War thinking has lost touch with the human rights tradition that alone can ground an ethical framework for thinking about the systematic and organised use of violence.

Shaw's critique plugs into a wider trend in thinking about war, one with which Just War has not engaged. This is to appeal to different notions of the role, nature and meaning of territory in international politics as part of the emergence of non-state based conceptions of space and scale (e.g. Agnew, 2003; Scholte, 2005). Globalisation is a part of this, and the idea of a 'global war on terror' and ways in which Tony Blair has tried to locate both humanitarian intervention and anti-terrorism within a context of globalisation (Williams with Roach, 2006) point to these connections. However, the global scope of human rights claims underpinning humanitarian intervention (and Shaw's critique of Just War) and the trans-national

characterisation of al Qaeda and other terrorist organisations can be seen in the same light. Even the notion of ‘new wars’ raise questions not just about the brutality of the violence they engender but also about the understanding of territory that participants evoke. Sometimes, most notably in former Yugoslavia, this is about statehood and a national homeland, but even there, and more so in other places, such as the Democratic Republic of Congo, controlling territory is nothing to do with seeking a homeland or commanding political authority in the name of a political programme, it is about economic activity – ‘banditstans’. Political fears about ‘failed states’ have also shifted from the humanitarian catastrophe that followed the disintegration of political authority in Somalia and left it without a recognised government, to ‘failed states’ as havens for trans-national terrorists.

A lot of the contemporary Just War debate makes explicit references to the notion of ‘Westphalian’ states and even where this nomenclature is absent, the understanding of territory in Just War debates typically fits this general pattern (e.g. Gilbert, 2003: 103-4; Elshtain, 2003: 65). Here, to borrow Elshtain’s (2003: 65) words, ‘The presumption of state sovereignty held that the state alone was the arbiter of what counted as justice, law and freedom within its bounded territory.’ Whilst, as we have seen, Just War theorists like Elshtain have been keen to set limits to permissible interpretations of justice, law and freedom, the notion that the institutionalisation and operationalisation of these crucial ethical values revolves around the state remains almost unchallenged in the Just War literature this paper has surveyed. So, for example, for Buchanan and Keohane (2004) the institutions that will hold accountable states (and it is states alone) that carry out preventive military operations are the United Nations, backed-up by a coalition of democratic states. For Téson (2005), Just War will reform tyrannical states to make them partners in the protection and promotion of human rights, rights understood, as Elshtain argues (2004) to require a territorialized political authority claiming sovereignty if they are to be practically meaningful.

However, this conception of territory is not to be taken for granted and the constellation of identity, values, authority, security and power that accrue in this rich and complex notion of the state is certainly not a fixture of the past 350 or so years since Westphalia. Such a myth, although widespread and deep-rooted, is relatively novel – potentially as recent an invention as the late 1940s (Stirk, 2006). Political geographers (e.g. Agnew and Corbridge, 1995) and particularly those falling under the critical geopolitics rubric (e.g. Thuathail, 1996) have explored the ways in which understandings of the nature and role of territory are connected to power political practices to show how territory and territoriality are highly political and dynamic phenomena. The relationship between territory, society and the state is a complex one and thus the relationship between territory and the values of such societies, including notions of justice and freedom, is far from being straightforward (e.g. Hakli, 2001). Our spatial ideas about scale, territory and borders play a significant role in what we value and how we value it, and thus in our ethical perspective on violence legitimised in the name of justice. The bordering of sovereignty within precise, razor-sharp lines on the map, is one example of ways that the meaning and significance of certain pieces of territory have altered. Border zones as places where security and identity are often under threat, places where wars are most likely to occur and places where sovereign authority is most visible through the policing of entry and exit from the state is one instance of this geographical distinctiveness (e.g. Andreas, 2003; Donnan and Wilson, 1999; Newman and Paasi, 1998; Williams, 2006). Experiences, such as that of the EU, show how the location, significance and character of borders can change, with the development of the Schengen agreement pushing these classic ‘sovereign’ function of controlling ingress and egress away from sovereign state like Belgium or Holland, which lack non-Schengen land borders, and towards the EU’s periphery and the idea of ‘fortress Europe’ being in the hands of the Slovaks, Poles, Slovenians, Greeks, Spaniards and others. This serves

to 'de-naturalise' the border of European states, reinforcing the need to think about activity like security, immigration and belonging at multiple scales and in spaces distinct from the 'Westphalian' state (Walters, 2002).

The scale at which security analysis within international relations takes place has also moved away from the state, to a position whereby regions are increasingly central to a diversified security agenda in which war and military action play an important but not necessarily dominant part (e.g. Buzan and Waever, 2003). Structural theories of state behaviour in international relations are also being pushed towards recognising regions as being of growing significance in political analysis. Buzan's (2005a) reappraisal of the English school, and his efforts to systematise its theory, produce both a renewed understanding of structure in English school theory and a clear commitment to adding a regional dimension to its scales of analysis. Similarly, his account of polarity (Buzan, 2005b) and the reintroduction of a category of 'great power' to augment 'superpower' and 'other' rests in important ways on the significance of regions and regional scope of a state's power projection capabilities and political ambitions.

War, and the justice or otherwise of war, are not subjects that Buzan devotes much attention to in his analyses of security, the English school, or polarity and the future trajectory of world politics, although Just War theory has a central position in the English school's normative agenda of creating and maintaining rules on violence (e.g. Bull, 1977). Nevertheless, this trend in security studies away from an almost purely statist analysis reinforces the sense in which responses to humanitarian intervention, trans-national terrorism and general debates about security are potentially in touch with ideas of changing scale, differing conceptions of political space and an awareness of the potential diversity in understandings of territory. Just War theory, though, appears to be heading in the opposite direction. The state is not only retaining its traditional central position, but this is being reinforced, and at some potential cost to Just War's ability to effectively engage with contemporary warfare. Whilst it is on this aspect of the problem that this paper focuses it is noteworthy that contemporary discussion of the political geography of war has not focused much on the ethics of war and the Just War tradition (e.g. Flint, 2003), so there is a failure to engage from both sides.

Space, scale, the state and ethics

It would seem uncontroversial to argue that the state has been at the centre of Just War thinking for the last two hundred years at least. The current intellectual developments by leading Just War theorists serve, if anything, to further embed this centrality. What is striking about this is that the move is a self-consciously ethical one – the state, so long the subject of ethical suspicion and critique – is being portrayed as at the heart of an ethical response to humanitarian abuse and terrorist violence. More specifically, the state is being portrayed as the vehicle for the just war against these ills and the basis for a lasting solution to them, especially when, as is increasingly argued, they meld into one.

Perhaps most striking here is Elshtain's (2003, 2004, 2005) deployment of Just War arguments in defence of military intervention that connect these to the creation, or re-creation, of an 'ordinary civic peace' (Elshtain, 2004: 46) as the *sine qua non* for ethical life. This civic peace requires a set of effective state institutions, but also requires that these take certain forms, are limited in power and held accountable in certain ways and are animated by a particular ethos of service to those over whom they exercise their limited authority. Elshtain sees just wars against those who preside over, whether through intention or neglect, humanitarian catastrophes or terrorist activity as being about a just war to bring the victims of such abuse within the embrace of a liberal democratic state.

Utilising the contingency of sovereignty that humanitarian intervention placed on the agenda, Elshtain (2003, 2004), in common with Téson (2005a), extends this contingency to taking effective measures against trans-national terrorist organisations, principally al Qaeda and similar groups. The threat they represent to the creation of civic peace in places such as Afghanistan and Iraq, and their potential to disrupt the civic peace of the US and other established Western democracies, generates just cause, and also compromises, if not removes, the sovereignty of those states that harbour or aid and abet them. The role and nature of the state as a political institution thus becomes an object of debate about just cause and also about legitimate authority and right intention within the *jus ad bellum* side of the Just War tradition. The authority of those states that maintain ordinary civic peace is superior to those that do not. The legitimate state is one that protects and promotes the rights and interests of its citizens, starting with their entitlement to live securely within a territorially bounded zone of ordinary civic peace. Where states fail to or are unwilling to deliver this, or are involved with organisations committed to the destruction of civic peace then, as with those murderous regimes who oversee humanitarian catastrophe, they lose any serious claim to legitimacy. They lack legitimate authority and their intention in resisting Western power is ethically reprehensible because it is about denying humans their right to live within a zone of ordinary civic peace. For Téson (2005a: 17), this leads to a clear statement of the ethical superiority of the intentions and authority of liberal democratic states: ‘the fact that the West has disproportionate influence on the [United Nations] Security Council is one of its *good* features. ... It is unacceptable that the decision whether to free people from tyranny, or to veto any such decision, be left to illegitimate regimes.’

This ordinary civic peace is necessarily territorialized and connected to the sovereign state. Elshtain (2003: 63) is clear about this – ‘Justice demands accountability and there is no political accountability where there is no structure of power and law. ... Absent such a structure, culminating in some form of political sovereignty [and] the likelihood of what we now routinely call “humanitarian catastrophes” is magnified manyfold.’ Her argument throughout *Just War Against Terror* reiterates this – if we believe in irreducible and inalienable notions of human dignity then we *have* to create and preserve areas of ordinary civic peace and in the absence of a plausible or desirable arrangement for securing that at the global level, the sovereign state is the best available means. That it is through the state that we plug this ordinary civic peace into the shared values, traditions and history of a community reinforces the security of civic peace. Relations between those states, though, cannot be separated off from this ethical imperative, seeing international relations as operating under different rules and according to a different ethical logic. Co-existence among states that secure the ordinary civic peace is unproblematic, but for those that do not, and in relations with non-state organisations that explicitly reject this ethical imperative, in favour, most commonly, of some kind of religious or ideological zealotry, coercion is justified and necessary. Retreat from the world by those states that fulfil these ethical imperatives is both self-defeating, because it allows their enemies the opportunity to prepare attacks, and an abrogation of their obligation to liberate those blighted by terrorism and tyranny.

Thus the state remains at the heart of the complex nexus of the search for order and justice which has for so long been a vital element of normative debate in international relations (e.g. Bull, 1977: 77-98). Whether the injustice is humanitarian catastrophe or trans-national terrorist attack then fighting a Just War against these ills offers the best way, both practically and ethically, of bringing about the necessary preconditions for human beings to enjoy inalienable dignity. Equal regard, argues Elshtain (2003: 64), is about ‘... an equal claim to the use of coercive force on your behalf, if you are a victim of one of the many horrors attendant upon

radical political instability.’ In a typically bravura finale (2003: 75), she argues that through her approach, ‘The brutal Melian rule is hereby reversed: The strong do what they must in order that the weak not suffer what they too often will.’

Appealing to the state as the solution to problems of human rights abuses is, patently, problematic, and hoping that the ‘strong’ will respond to this ethical imperative sits ill with someone who castigates Anthony Burke’s (2005) more traditionally internationalist critique as ‘the new utopianism’ (Elshtain, 2005). It is too easy, though, to see this as just a statist hangover from the time when Just War addressed inter-state conflict as its principal, if not sole, concern. It is true, though, that the principles with which we are so familiar are most easily applicable in the context of inter-state war or, with some adjustment, a civil war in which control of the state is the object of all parties. As this paper has already argued, though, that statist perspective on the space and scale of violence and security is widely challenged. Equally, notions of justice outside of the issue of violence, most obviously in debates about distributive justice, routinely extend beyond the state to the global level (e.g. Beitz, 1979). These wider realms of justice are not unrecognised, indeed, Elshtain’s (2003: 74) notion of equal regard demands such recognition, worked out in terms of concentric circles of obligation. However, when it comes to the political authority able to grant justice, and the relationship between individuals and that authority, we are thrown, inextricably, it seems, back into the clutches of the state and a classic liberal notion of citizenship.

This is, in part, to recognise the way in which the US government in particular has tended to re-cast trans-national terrorist threats into a statist discourse (e.g. Williams with Roach, 2006: 2). The labelling of states as members of an ‘axis of evil’, the ascription of responsibility for combating terrorism to governments – it was governments who were to decide whether they were either ‘with us [the United States], or with the terrorists’ (Bush, 2001) – and the interdiction of terrorist ambitions to acquire WMD via preventing state acquisition of such technologies is telling in relation to a stubbornly ‘Westphalian’ world view. But more to the point here is that the academic debate about Just War, humanitarian intervention and terrorism, especially when the latter two are connected, quickly does the same thing. The targets of a Just War, though, do not share this geographical perspective.

The distinctiveness of the political programme that motivates a network, and the very idea of a networked form of organisation, point to a distinctive conception of political space and scale. The ethical debate about the use of violence in response to humanitarian crises and trans-national terrorist organisations needs to extend beyond debates over the ethical character of the state, the ethics of citizenship and the nature and extent of international ethical obligation. Whether seeking to use Just War theory to ground a limited right to humanitarian intervention, with, notably, long-term obligations to re-build a functioning and hopefully liberal state (Wheeler, 2000; ICISS, 2001); or to justify the pursuit, by the world’s leading power, of military action against terrorists and states that may abet them (Elshtain, 2004), the issue of scale arises.

At its crudest, but this might serve as a simple illustration, we can see this in the distinction drawn within Islam, and particularly important to those who seek Islamic justification for jihad as holy war against non-believers, between the dar al Islam and dar al harb. The realm of Islam – of truth, justice and peace – and the realm of war which the true believer is duty bound to conquer, destroying those who do not convert, may be a deeply problematic reading of Islamic teaching, but it also highlights a radically different notion of political, and ethical, scale. The sense of injustice against Muslims being felt throughout the *umma* – the community of believers – is a powerful rhetorical tool, but also a notion of ethical scale that does not have a

parallel in Western liberalism. The geographical dispersal of injustices across different places, or the seemingly distinctive political causes or manifestations of injustice that, to a liberal perspective, generate incoherence, may have commonality from the perspective of a different scale.

For liberals, one moves from the community of citizenship to the community of humanity and the idea of universal rights. Regional citizenships, institutionalised in the European Union, of course, do not (yet?) have ethical resonance, it seems. This paper lacks the space, and its author the expertise, to develop these themes in further depth, but it does highlight one way in which our notions of ethical scale may not track across to other ethical traditions. This does not have to result in a communitarian account, ruling out most, but not necessarily all, of the claims to ethical universality (e.g. Walzer, 1983, 1994), but it does help us recognise that there are different ethical scales, and thus a need for different political scales, too, from those that are the commonplaces of the Western ethical and political imagination. Political programmes that appeal to these different and distinctive ethical spaces and scales may not be incoherent, as they frequently appear, and they should not be dismissed without due consideration. That, of course, is not to deny the possibility of incoherence or ethical indefensibility, but hard-wiring a notion of ordinary civic peace, for example, into a statist territorial political programme connected to sovereignty and an ethical scale that privileges the state cannot be done without serious discussion of alternatives. Equally, our notion of Just War has to recognise the challenges here, too.

Just War and the ethical primacy of the state

The state-centrism of the Just War tradition over the last two hundred years continues to cast a long shadow in the face of debates over the use of violence that appeal to the universal – humanitarianism – and the trans-national – religious fundamentalist terrorism. The bordered, territorial political community claiming sovereignty offers a reassuring hearth around which we can regroup and reconsider how to respond ethically to these challenges. The problem, particularly in relation to trans-national political projects and programmes, is that this response is unable to engage effectively with such challenges. A military response may be ethically correct, but the worry here is that the dice are loaded in favour of a military response on the grounds that the political programmes and projects of trans-national scale are more or less automatically excluded from ethical consideration.

This is not to defend the violent, and especially terroristic, pursuit of such programmes. It is, though, to reiterate that by increasingly embedding the ideal-type of the liberal state at the heart of the *jus ad bellum* principles of legitimate authority, just cause and right intent in particular, the contemporary debate about Just War denies the ethical power that such projects *can* claim, and grants to states an ethical standing that the record of even the most liberal might struggle to live up to. This paper has no trouble with the idea that some forms of state are ethically superior to others and that ethical relativism is inadequate, so is not arguing for such a standpoint. But the value that exists in non-state based forms of political identity and community; in ethical codes that do not take their frame of reference from a specific, territorialized perspective; and from notions of security, authority and obligation that exist at scales different from the state and the global is denied by these contemporary developments in Just War thinking.

Turning from the ‘negative’ side of this debate – what is ethically condemnable – to the positive – what is laudable – serves only to reinforce this problem. The prescription for ethically defensible responses to these challenges is to recognise the combination of might and

right to be found in the liberal states of the world, and especially the United States, which possesses not only a position of military dominance but also a historical, cultural and political legacy of unique virtue. US exceptionalism is not just a trait in US political culture (e.g. Buzan, 2005b: 154-64), it is a reflection of the ethical superiority of the United States (Elshtain, 2003: 64, 73; 2004: 168-73; Téson, 2005: 19-20). This is not an ethical vision of a liberal global civil society, or a trans-national network of humanitarian and human rights NGOs, but instead a coalition of willing liberal states, under the leadership of the USA, utilising international organisations where possible, by-passing them when necessary, in pursuit of a world where new allies are created via the implantation of just political arrangements and the defeat of ethically bankrupt challengers. It is not surprising that the label 'imperialism' has returned to prominence.

Thus Just War thinking arguably faces the need to address a lack of geographical imagination in its response to these key contemporary debates about the ethics of violence in international relations. This has implications for all three of the divisions of the just war tradition – *jus ad bellum*, *jus in bello* and *jus post bellum*. This paper lacks the space to explore these in full, but hopefully certain instances may illustrate the potentially significant challenges that could arise.

For the *jus ad bellum* the state as the site of legitimate authority and therefore the key declarer and prosecutor of war has been challenged, especially in discussions of humanitarian intervention, by the idea of the UN Security Council as a superior authority (in both senses of the word). This, however, retains the statist basis of the legitimate authority principle and also limits the perspective of just cause to those instances where the Security Council can agree to utilise the elasticity in the idea of threats to international peace and security. Recognising the moral authority of non-state actors in this regard and the justice of causes which are inherently ill-suited to a statist framing or mediation becomes very difficult and Just War becomes allied to a conservative interpretation of international relations. The alternative scales and differently territorialized conceptions of space in these programmes are ill-served by the established Just War discourse, and the developments in the theory over the last decade have done little to address this effectively. This is despite the inherent notions of space and scale within *jus ad bellum* principles, such as proportionality, which asks us to consider the balance between the harm of the originating act of violence against the harm of the putative violent response. The geographical extent of that violence is part of this – a global war on terror, for instance, suggests a violent response could occur anywhere. However, the reality has been the corralling of an ostensibly 'global' scale within a state-based framework. Equally, the spaces of violence have also remained largely conventional in terms of the ethical debate – the 'battlespace' has remained, conceptually, the 'battlefield' – a discrete and specific geographical location where those who are permissibly subject to violence congregate. Securing spaces where either political authority is complicit with terrorist networks or where authority is so weak as to be unable to prevent their operations is a commonplace in political debates about the war on terror (e.g. Williams with Roach, 2006). A distinction is still drawn, though, between this and a 'battlefield' – the ethical location of legitimate large-scale violence.

Talk of the 'battlefield' raises the issue of the implications of this argument for the *jus in bello*. Here the categories of combatant and non-combatant have been challenged anew. Some (e.g. Buzan, 2002) have risked advocating a re-opening of the debate within Just War whereby the innocence of non-combatants is connected to their not presenting a real or imminent threat of violence, as opposed to being innocent of any political commitment to support an unjust political project. When that political project lies outside of the established, state-focused frameworks Just War is used to dealing with, then the problem is exacerbated. Can one be a combatant in the name of a trans-national political project that cannot be accommodated within

the dominant contemporary geographical framework, and can one claim the authority of acting in the name of the leaders of such a project? Whilst this helps to highlight the long-standing problem in relation to terrorists as either combatants or non-combatants, and leaving aside the US government's designation of 'illegal combatants' in order to open some room for manoeuvre on this issue, the question of proportionality is at stake here, as well. Whilst the combatant/non-combatant distinction has grabbed most of the attention in the war on terror, and also in humanitarian intervention debates where the status of irregular paramilitary forces has been important, the issue of proportionality is also potentially controversial.

The global war on terror, for example, places at the centre of the challenge the idea of trans-national terrorist networks, loosely affiliated to one another and based on local cells, operating across borders and with little connection to established, territorialized political authority. However, do our ethical concerns about the proportionality of violence reflect this, or, if not, how does this contribute to the debate about military operations? When judging the proportionality of violence do we judge against the damage inflicted against 'global terrorism', if such a label has utility, or do we judge it against the local cell and the environment in which they are operating? Given the looseness of the affiliations and the absence of centralised command and control characteristic of networked terrorism where, for example, al Qaeda is likened to a brand rather than any sort of centralised structure, can attacks in one place be justified in terms of proportionality by reference to damaging affiliated elements of the network elsewhere?

Finally, the *jus post bellum* standard that emerges from the literature on humanitarian intervention and the war on terror seems focused on creating functioning states. Ideally these are liberal and democratic in character, able to establish, protect and embed social, political and economic structures that will secure the new state in the short-term and, looking further ahead, bring about the kind of civic peace Elshtain advocates. This foundation will also help create economic prosperity to address social exclusion and disillusionment that are often portrayed as deep-rooted explanations for the attractions of violence. Irrespective of the empirical accuracy of these claims, this is, by any standards, a Herculean political task. It also represents an ethical prescription out of kilter with the Just War tradition's far more limited practice of addressing the immediate causes of war. Of course, the advocates of a more ethically ambitious and transformative Just War are able to appeal to classical authority for their ideas – the idea of a Just War being one that will ensure there is no need to repeat the exercise, and thus the need to get to the root causes. However, the record in Bosnia, Somalia, Kosovo, Afghanistan and Iraq so far gives serious pause for thought about the viability of such an approach, practically and ethically.

More extensively, this paper has raised questions about the viability of a statist strategy for addressing the challenge of *jus post bellum*. As we have seen, ethics, identity and security are being addressed at different scales and in different spaces, and these, too, need to be part of the mix of debate about an ethical response to post-conflict societies and how to effectively address terrorism. Just War thinking has yet to pick up on this in a systematic fashion and explore in depth and with sustained attention the opportunity for different spaces and scales to play a positive role in how we think and act ethically in response to the aftermath of armed conflict.

Conclusion

The longevity, flexibility and sophistication of the Just War tradition is imposing and its centrality to contemporary debates about humanitarian intervention and the war on terror

unsurprising as a result. However, the question of the political spaces that the Just War tradition envisages as the location of ethical debate and behaviour and the political scale at which it operates are potentially problematic. Humanitarian crises and trans-national terrorism pose important questions in both these regards and, so far, Just War thinking has not picked them up. The state retains its central position in all three arenas of contemporary Just War thinking and this is hampering its ability to respond, not in terms of ethical critique of human rights abuses and terrorist attacks – these are goals into which Just War theorists have found it easy to hit balls – but in terms of accommodating, even recognising, the potential ethical import of non-state based frames of political reference and scales of political activity. This paper has suggested this is a problem that is rooted deeply in the Just War tradition and that a more dynamic approach to these topics in other parts of international relations is not being followed through here.

A comprehensive analysis of what this might mean in terms of exploiting Just War's famed flexibility to better meet this challenge is a long-term project a single paper cannot hope to attempt. However, I have tried to sketch some sort of agenda, or at least a set of provisional starting points in *jus ad bellum*, *jus in bello* and *jus post bellum* terms. If nothing else these have hopefully served to highlight the ubiquity of the problem that a lack of open-mindedness to the problems of scale and space represent. Territory, borders and ethics have received fairly limited consideration in the past, especially in international relations (e.g. Williams, 2006), but that position, it is argued here, is unsustainable. Just War theory has made some adjustments to address the changing ethics of violence of the last fifteen years, but now it needs to take on the recognition, evident elsewhere, that our political spaces and scales are diversifying and, as a result, our political ethics, including the ethics of war, are under renewed pressure and in need of renewed innovation. The next chapter in the long history of Just War theory needs to be about ethics, space and scale.

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